Supreme Court, U.S.
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No. _____

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

DYNA CORPORATION, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ Of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in affirming the holding of the District Court denying attorneys fees and costs to the Appellant under 29 U.S.C. Section 2412, by finding the United States substantially justified in intervening in the False Claims Act violation case below, by:

a) finding substantial justification, when the complaint contained erroneous statements of fact even when some of the true facts were in the possession of the United States, and preliminary testing would have ascertained other facts;

b) ignoring that fact that no evidence of scienter, an essential element of a False Claims Act case was ever presented; and

c) affirming the District Court based on a legal theory not advanced by the United States or pled by the United States in the case below and not supported by facts contained in the record.

2. Whether the Court Of Appeals erred by employing a reasonable justification standard rather than the substantial justification standard required by 29 U.S.C. 2412.

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OCTOBER TERM, 1993

DYNA CORPORATION, *Petitioner*

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals [App. A, *infra*, A1-A11] is unreported /1. The opinion of the District Court [App. B, *infra*, B1-B33] is unreported and the order denying the Motion For Reconsideration [App. C, *infra*, C1-C15] is unreported.

/1 Defendant/Appellant Glenn F. Hare is not a party to this Petition For A Writ Of Certiorari.

JURISDICTION

The Court of Appeals entered its judgment on February 17, 1994. No rehearing or further consideration occurred. The jurisdiction of this court is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

Petitioner seeks recovery of its costs and attorney fees under 28 U.S.C. Section 2412 as the prevailing party against the Respondent, the United States of America, in an action brought by the United States of America pursuant to 31 U.S.C. Section 3729 under the authority of 31 U.S.C. Section 3730. The statutory citations are set forth in the Appendix, *infra*, as Appendixes D, E and F, respectively.

STATEMENT OF THE CASE

In 1987, the Petitioner, Dyna Corporation [hereinafter referred to as "Dyna"] entered into a

contract with the United States of America, through the Department of Defense, to supply 11,096 Hare Traction splints at a price of $88.00 apiece. [ER, page 39]. The Hare Traction splint is an emergency first aid device to immobilize, align and place traction on the leg in the event of bone fracture [ER page 39]. The length of the splint itself is tubular and has a "U" shaped metal rod heel stand which is used to elevate the leg slightly when the patient is in a prone or reclining position. The bottom of the "U" shape of the heel stand rests on the ground. When not in use, the heel stand is stored folded under the splint and parallel to the length of the full splint device itself. To allow for elevation of the leg, the heel stand swings downward and locks into position perpendicular to the length of the splint device. The two top ends of the heel stand [the top of the two "U" shaped ends] are each inserted into a wheel device. The wheel device is attached to the length of the splint by pins that run through them and a common connecting

piece on the tubular length of the splint.

The splints were delivered to the United States Department of Defense with certificates of compliance, signed by Ronald Davis [hereinafter referred to as "Davis"], a Vice President of Dyna at that time [ER page 34; pages 111-137]. The last shipment occurred on November 2, 1987 [ER page 34].

In May of 1988, Davis was terminated by Dyna for what Dyna viewed as self dealing and attempts by Davis to misappropriate for himself business opportunities belonging to Dyna and attempting to use other Dyna employees to develop those business opportunities in direct competition with his employer. [ER page 362].

On October 27, 1988, Davis, as a relator, filed an action for damages against Dyna Industries, DynaMed [both corporate entities having been subsequently merged into Dyna Corporation] and Glenn F. Hare, its President, pursuant to 31 U.S.C. Section

3730 [CT 2]. Davis alleged that he had been wrongfully terminated, and further alleged that Dyna had engaged in fraud by shipping Hare Traction splints to the United States that were certified as in conformity with contract specifications, yet were in fact defective, and making a claim therefore with knowledge of the defect. The party who had certified that the splints were in conformity with the government contract was the relator, Davis [ER pages 111, 112, 363].

Pursuant to the provisions of 31 U.S.C. Section 3730, the complaint was sealed [CT 1]. Three *ex parte* applications were made by and granted to the United States for extensions of time in which to consider election to intervene and to keep the complaint under seal [CT 4, 5, 6].

On June 12, 1989, the United States elected to intervene in the action [CT 7]. On July 31, 1989, the United States filed its first amended complaint [CT 13].

In its complaint, the United States alleged that

the splints did not conform to the contract and were defective because:

1) the splints were fabricated from sintered metal rather than stainless steel as had been used previously. There was in fact no contract requirement that stainless steel be used. The United States also alleged that the substitution of infiltrated iron for stainless steel made the splints "more brittle, more susceptible to fracture under stress, and exhibit lower tensile strength". [ER page 9] It was this substitution that the United States alleged caused the "cracks" /2. In

/2 Throughout this litigation, the cosmetic irregularity has been referred to as a "crack". In fact, it is a metal displacement only visible with magnification enhancement and is only centimeters in length. The "crack" was in fact caused in only a small number of the splints due to a machining error. To hold the metal rod of the heel stand in place inside the wheel in order to drill the hole through both the rod and the wheel to insert the pin, the wheel was given a dimple where the heel stand enters the wheel. The machine operator was striking the wheel with too much force, causing the "crack". When this metal displacement was detected in Quality Assurance, they were told to 100% inspect. The splints found with the "cracks" were pulled and new wheels placed on them. The force of the dimpling on the machine was lessened and the "cracking" ceased to occur.

fact, the allegations about the metallurgical properties of the two metals was factually false, and in fact the sintered metal has a higher tensile strength than does stainless steel.

2) Stand stop pins that were not knurled but instead were glued into place which are more likely to fail [ER page 9]. No evidence was ever cited to the District Court of any failure of a Hare Traction splint from any cause. In fact, this allegation was so devoid of merit that the United States dropped it as an allegation when preparing its pretrial order.

The actual allegations of the complaint could not be substantiated in fact. The United States then took the position, *de facto,* that the splints which had cracks were defective since they could fail and injure a person held in traction by a splint. The United States took this position without any facts to support the position, without any tests that the cracks could affect the functionality, and even though these splints had been in

the field for over two years prior to filing its amended complaint, the United States never undertook any inquiry as to whether any of the splints had in fact failed. When the United States got around to testing the splints, it discovered that there was no functionality defect and that there case was seriously flawed [ER page 442].

Based on these discoveries, on July 31, 1991, approximately two years after intervening, the United States moved to dismiss the case without prejudice. Dyna sought to have the case dismissed with prejudice. [CT 102]. On October 7, 1991, there was a hearing on the motion to dismiss before the Honorable Earl B. Gilliam [CT 105]. On November 19, 1991, an order was entered granting Dyna's motion to dismiss with prejudice [CT 111].

On December 17, 1991, within 30 days of entry of judgment in the above-captioned case, Dyna made an application for an award of attorneys fees and litigation

costs under the Equal Access To Justice Act, 28 U.S.C. Section 2412 [CT 114].

On January 27, 1992, Judge Gilliam entered an order recusing himself and re-assigning the matter to the Honorable John S. Rhoades [CT 125]. The motion for the application was then re-assigned from Judge Rhoades to the Honorable Judith N. Keep on January 20, 1992 [CT 126]. On February 18, 1992, a hearing was conducted before Judge Keep [CT 132], and on March 6, 1992, an order was entered denying Dyna's application for attorney's fees and costs [CT 133].

On March 18, 1992, Dyna moved the court to reconsider the application for attorneys' fees and litigation costs [CT 134]. On June 8, 1992, judgment was entered denying the motion for reconsideration [CT 140]. On July 24, 1992, a timely appeal was filed with the United States Court of Appeals for the Ninth Circuit [ER 471]. Oral argument on the appeal was held on February 4, 1994 and the decision of the Court of

Appeal, affirming the District Court, was filed on February 17, 1994.

REASONS FOR GRANTING

A. Summary Of Argument

Respondent, the United States of America, intervened in a *qui tam* action alleging violation of the False Claims Act, 31 U.S.C. 3729 *et seq.* The United States later sought dismissal of its case without prejudice. The District Court instead dismissed with prejudice.

Thereafter, the Petitioner brought a motion, pursuant to 28 U.S.C. Section 2412, the Equal Access To Justice Act, seeking its costs and attorneys fees as the prevailing party.

On hearing, the District Court, by a Judge different than the one who dismissed the case, held that the United States was substantially justified in intervening, and denied the motion. The Court of

Appeals affirmed the holding of the District Court. The District Court and the Court of Appeals employed the reasonable basis standard and not the substantial justification standard required by statute. This effectively renders the Equal Access To Justice Act applicable only to action found to be wholly frivolous. The statute is intended to cover actions for which there is no substantial justification, not just frivolous actions, and therefore, both courts employed an improper standard.

Additionally, the Court of Appeals based its decision of substantial justification on a theory of liability not relied upon or pled by the United States and not supported by any findings of the District Court. Therefore, the Court of Appeals has interpreted 28 U.S.C. Section 2412 to apply to any theory of liability, whether or not relied upon in fact by the United States in its decision to prosecute a case. The statute clearly requires a determination of substantial justification based on facts and theories of liability actually relied upon by

the United States, not ones it may have been able to or, by extension, could have permissibly relied upon.

There is no clear standard for substantial justification. The standard applied, based on the facts of this case, appears to allow an award only in actions found to be frivolous. This is not the correct standard as contemplated in the enactment of the Equal Access To Justice Act. This standard fails to adequately address all instances of conduct envisioned to be circumscribed by the Act as was contemplated by Congress, and should be reviewed by this Court to provide a clear standard higher than Federal Rule of Civil Procedure 11 for frivolous actions.

B. Argument For Granting Petition

Under the Equal Access To Justice Act, in reviewing whether the government's position is substantially justified, one of the factors is whether there is a substantial justification for the basis in the

truth of the facts alleged. Prior to the 1985 amendments, courts centered on whether a reasonable basis existed. Donovan v. Dialamerica Marketing, Inc., 757 F.2d 1376 (3rd Cir. 1985). However, since the 1985 amendments, the standard is substantial justification, which requires more than the position of the United States be reasonable, it must be supported by substantial evidence, not just merely "some evidence". Rodriquez v. Bowen, 678 F. Supp. 1456 (E.D. Cal. 1988). The position cannot be based upon supposition, hypothesis, or uniformed opinion. The standard of substantial justification is higher than the standard required for an award of sanctions under Federal Rule of Civil Procedure 11, even after the recent amendments. Magler v. Heckler, 621 F. Supp. 1009 (D. Colo. 1985). Even Federal Rule of Civil Procedure 11 required that the pleadings be based upon a good faith belief which was formed after reasonable inquiry, and that the pleadings are well grounded in fact.

Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49, 98 L.Ed. 2d 306, 108 S. Ct. 376 (1987).

The test of substantial justification is a result of Congressional compromise between the two standards for fees under the Civil Rights Act. One standard was recovery by a prevailing party, and the other was based on recovery only if it could be shown that the litigation was frivolous, unreasonable, or without foundation. The first standard was believed to be too high and would create a chilling effect on government enforcement efforts. The second standard was deemed too low as it "would not overcome the strong disincentives to the exercise of legal rights which now exist in litigation with the government". Sen. Report No. 96-253; H.R. Rep. No. 96-1418, U.S. Code Congressional & Administrative News, 4984, 4988. Therefore, to be substantially justified, the government's position must be higher than just reasonable conduct, since Congress refused to

change the standard from substantially justified to reasonably justified. *See,* Riddle v. Secretary of Health & Human Services, 817 F.2d 1238, 1244 (6th Cir. 1987).

1. The Finding Of Substantial Justification Based On A Determination That The Actions Of United States, Through The United States Attorney, Were Reasonable Despite No Witnesses Being Interviewed By The United States Attorney, No Testing Being Conducted On The Splints, And Inclusion Of False Statements In the Allegations Of The Complaint, And Failing To Establish Scienter On The Part Of The Defendant Is Inconsistent With The Intent Of The Equal Access To Justice Act.

To overcome a motion for attorneys fees and costs under the Equal Access To Justice Act, the United States must demonstrate that it was substantially justified in bringing the action, both in law and in fact. Bullfrog Films, Inc. v. Wick, 959 F.2d 782 (9th Cir. 1992). The decision of the District Court and the affirmance of that decision by the Court of Appeals does not follow this standard, and creates a lower, impermissible standard of mere reasonableness.

a. The United States, Through The United States Attorney, Cannot Be Substantially Justified When It Fails To Verify Allegations, Rests On Speculation And Thereby Alleges Facts In Its Complaint That Are False.

The United States based its intervention on the fact that a "crack" existed in some of the splints shipped to the United States. There was never a finding that the "crack" affected the serviceability or the functionality of the product. The reason such finding is not in the record is that it does not exist. The "cracks" in fact do not affect the functionality or serviceability of the splint.

Although the United States sought three extensions to investigate this case, it had no idea before intervening what significance, if any, the "cracks" had on the use or durability of the splints. Even with this extended investigation period, the United States apparently spent no time to validate the accuracy of the allegations contained in the complaint.

For example, the United States had been given accurate information about the tensile strength of

stainless steel. a metal previously used in the splints, and the tensile strength of sintered infiltrated iron used in the splints sold to the United States. This information came from Compax, the company that supplied both metals to Dyna. This information, from ASM testing data sheets [ER pages 469-470], stated the tensile strength of infiltrated iron to be higher than stainless steel. Despite this information, the United States alleged that stainless steel had a higher tensile strength than infiltrated iron. This is scientifically *false.*

As another example, the United States alleged that the splints that were glued and not knurled had failed in use. This statement is factually *false*. Judy Stowe, the head of Quality Assurance at the time, states that the gluing *cured* a potential problem with the pins in the splints, not created one [ER 276]. No splint sold has ever failed to function, period. Even though this splint had been sold to the government almost two years prior to the intervention by the United States, no inquiry

was made to see if any of the splints sold to the government had failed. This allegation was adopted *carte blanche* from the initial complaint of Davis and apparently was never verified in any manner during the investigatory period since the allegation is false. As troubling is the fact the United States adopted this allegation from a person who had just been terminated by his employer and was also suing for unrelated wrongful termination causes of action, and was the very person who certified under penalty of perjury that the splints conformed to the contract. It is conceivable that a party could be substantially justified, for example, in bringing an action where facts cannot be proven to meet a burden of proof. However, it is another thing to find substantial justification when allegations are objectively false.

Had the United States undertaken, during its expanded investigatory phase, even the testing that it eventually undertook and discovered it had no real case,

the time and resources of the United States and Dyna would not have been utterly wasted. The Court of Appeals notes that the "government possessed a substantial amount of evidence" [Appendix, *infra*, page A7], the accuracy and validity of that evidence was never investigated or verified prior to intervening. Yet, the United States Attorney, the District Court and the Ninth Circuit are in effect stating that the United States is justified in bringing its full might against a private citizen not based on verified facts, but on lay conjecture and speculation with no obligation to validate any of its speculation with credible, factually accurate evidence admissible in a court of law prior to bringing the case.

b. No Credible, Admissible Evidence Of Scienter Was Ever Presented, Although Scienter Is An Essential Element Of A False Claims Act Violation.

Completely ignored by the District Court and the Court of Appeals is the lack of any credible, admissible

evidence of scienter on the part of Dyna or Glenn Hare. Yet, in any False Claims Act action, scienter is an essential element. United States ex rel. Hagood v. Sonoma County Water Agency, 929 F.2d 1416 (9th Cir. 1991); 31 U.S.C. Section 3729(b). The documents and witness statements in the possession of the United States prior to intervening show that when the cracking problem was brought to the attention of Dyna management, the quality assurance personnel were told to 100% inspect, pull all splints that show cracks, and send them back for reworking. [ER 300, 303, 305-306] The only possible evidence the United States had that Dyna management knew of cracks, and in response said to ship them anyway, comes from Davis, a witness of suspect credibility. Even Judy Stowe's statement, when carefully reviewed, shows that her understanding of what management said about shipping cracked splints is based on the hearsay statements of what she was told management said, not by any first hand knowledge. The

Court of Appeals even concedes the scienter requirement was weak [Appendix, *infra,* page A9], yet states that this weakness was not demonstrated until depositions were taken of these witnesses. Yet in depositions, this required nothing more than asking the witnesses to provide specifics to broad, generalized hearsay statements relied on by the United States in intervening. These witnesses could have been asked these same questions during the investigation period. The holding of the District Court and the affirmance by the Court of Appeals in effect says the United States did not have to do so. What then is the purpose of the statutory investigatory period?

However, when called to task and required to justify its actions, the United States centers its justification not on the significance of the "cracks" and the affect on the performance contemplated by the contract specifications, but on the basis that "cracks" existed *per se*.. Then by extension, since the "cracks"

existed, and the affect on the performance of the splints is unknown, the United States must intervene without investigation to prevent potential injury, without any requirement that it first determine whether or not that is a reasonable concern.

Even so, for two years after the time that the United States started conducting its investigation, it continued to ship the splints under investigation to military installations.

Some level of inquiry as to the soundness of the concern must be present for the United States to demonstrate substantial justification. Under the facts of this case, the level of inquiry was so low that, in denying the motion for fees and costs, the District Court, and the Court of Appeals in affirming the District Court, have effectively rendered all actions, except clearly frivolous litigation, as substantially justified. This is inconsistent with the statute and the Congressional intent in enacting this statute.

2. The Court Of Appeals Adopted A Theory Of Liability Not Pled By The United States In Finding The United States Substantially Justified Although The Equal Access To Justice Act Requires A Determination Based On The Facts And Law Actually Relied Upon By The United States.

A party cannot raise a new theory on appeal that was not presented to the court below. Caps v. Humble Oil and Refining Co., 536 F.2d 80 (5th Cir. 1976).

The facts as contained in the complaint, and the violations of the False Claim Act asserted by the United States in the complaint, focused solely on two theories. First, the contract requirements had been fraudulently violated, based on the supposition that the substitution of infiltrated iron for stainless steel made the splints "more brittle, more susceptible to fracture under stress, and exhibit lower tensile strength. It was alleged this substitution that caused the "cracks". Second, the contract specifications had been fraudulently violated by using glue, rather than knurling the pins. As noted earlier, the factual assertions of the complaint that

ostensibly were the basis for the allegation that the False Claims Act had been violated were false.

The United States Court of Appeals was faced with the evidence that the United States went forward with no investigation and made untrue allegations. It seems clear the investigation was superficial, incomplete, and was never subject to critical review as to whether there was a provable case. Notwithstanding, the Court of Appeal concluded, in affirming the ruling of the District Court, that the United States was substantially justified on the theory that "cracks constituted imperfections which the contract prohibited" [Appendix, *infra,* page A5]. No facts and no cause of action was ever alleged by the United States that a technical violation of the False Claims Act had occurred by the presence of cosmetic imperfections. The Court of Appeals held that these "cracks" failed to meet contract specifications in the same degree that the presence of dirt, grease, burrs and pits, also cosmetic

imperfections prohibited by the contract, would fail to meet contract specifications. The Court of Appeals has adopted a theory which the United States never pled. The United States never alleged any facts of cosmetic imperfections, nor that the contract specifications had been violated by cosmetic imperfections. The gravamen of the allegations of the United States were that the "cracks" constituted a health and safety risk, not a technical violation of the False Claims Act.

The inquiry by the District Court, in determining if there was substantial justification, is whether the position actually taken by the United States is supported by both the facts alleged and the law. Bullfrog Films, Inc. v. Wick, 959 F.2d 782 (9th Cir. 1992). The Court of Appeals affirmance of the District Court on a theory not alleged by the United States, and a theory not before the District Court when it made its decision, was improper.

Dyna asserts that the resources of the United

States would not have been mustered to prosecute a contract violation for cosmetic imperfections. In fact, Dyna had offered to extend its warranty to the year 2000 and replace all splints the United states believed were not in conformity. This offer was rejected.

Stripped away, the facts are that the United States did not have a case, but thought it could obtain a quick settlement. When Dyna said no, and required the United States to prove its case, it sought to avoid liability for poor investigation and conjecture by the assertion of the pretext that technical violations were contemplated and constitute substantial justification in intervening in this case. However, the United States only asserted this position at the appeal level, and not in any pleading before the District Court.

Additionally, in effect the District Court and the Court of Appeals has lowered the standard of what constitutes "substantial justification". Technical, not substantive violations of the False Claims Act justify

expenditure of critical government resources and expenditure of corporation funds otherwise available for capital improvement and employment. By this holding, the only sustainable claims for attorneys fees and costs under the Equal Access To Justice Act are for frivolous actions where there is **no** basis in law or fact for the United States to bring the action. This is not the rationale for the enactment of the Equal Access To Justice Act. It was not intended to just compensate defendants in frivolous actions, but also in actions where, had the United States conducted investigation into the essential facts and exercised some prudence and deliberation, the case would not have been brought.

It also is designed to provide the United States the financial incentive to carefully evaluate its actions and not misuse the power of the government. The holdings below in this case do not further this purpose.

This court should expand on the rationale of the Gwaltney of Smithfield, Limited case to ensure these

ends are accomplished. This court should establish that the substantial justification standard under the Equal Access To Justice Act is higher than the requirements of Federal Rule of Civil Procedure 11 not to bring frivolous actions. It is also urged that the court establish that the standard of substantial justification requires, in civil litigation brought by the United States, that the United States be required to demonstrate the credible facts it relied upon to establish all of the elements of a cause of action, and further, that the credibility and reliability of witnesses be evaluated to establish whether these facts can be proven prior to commencing the litigation.

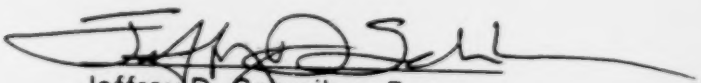
Otherwise, the United States is no different than litigants who bring speculative or questionable claims in the hope of a quick settlement, knowing their adversary has no meaningful alternative but to settle or capitulate.

CONCLUSION

Dyna respectfully requests that this Honorable

Court reverse the affirmance of the holding of the District Court that the United States was substantially justified in bringing and maintaining the False Claims Act action. Dyna further requests that this Honorable Court establish for all circuits, that substantial justification is a standard of reasonableness, higher than the standards of Federal Rule of Civil Procedure 11, and that substantial evidence, not just some evidence, is required for the United States to meet its burden of substantial justification.

Respectfully submitted,



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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED FEBRUARY 17, 1994

UNITED STATES OF AMERICA ex rel. RONALD DAVIS,	)	No. 92-56318
Plaintiff-Appellee,	)	D.C. No. CV 88-1695
v.	)	**MEMORANDUM***
DYNA CORPORATION,	)	
Defendant-Appellant	)	

Appeal from the United States District Court
for the Southern District of California
Judith N. Keep, District Judge, Presiding

Argued and Submitted February 4, 1994
Pasadena, California

Before: D.W. NELSON, REINHARDT, and BRUNETTI, Circuit Judges.

Qui tam defendant Dyna Corporation ("Dyna")

appeals the district court's denial of attorneys' fees

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

incurred in defending a False Claims Act suit following the government's decision to intervene. The district court dismissed the case with prejudice. Dyna contends that the district court erred in holding that the government's position was substantially justified under the Equal Access To Justice Act. See 28 U.S.C. Section 2412 (d)(1)(A). Dyna also requests that the case be remanded for further proceedings in light of newly discovered evidence. We affirm.

Ronald Davis, a former employee of Dyna brought this case under the False Claims Act alleging that the company had shipped splints to the government which failed to comply with their contractual specifications. After receiving several extensions of time in order to investigate these claims, the government elected to intervene on June 12, 1989. In it amended complaint, the government alleged that Dyna "knowingly furnished splints that did not conform to Dyna's own drawings, specifications, standards, and quality

assurance practices." As weaknesses in the government's case became apparent towards the end of 1990, the government sought to negotiate a settlement. These efforts eventually failed, and the government moved to dismiss the case without prejudice on June 27, 19991. On November 20, 1991, the district court judge dismissed the case with prejudice. However, the district court denied Dyna' timely application for attorney's fees.

We conclude that the district court did not abuse its discretion in deciding the government's position was substantially justified.1/ The contract between Dyna and the government prohibited "imperfections" in metal parts, regardless of whether these imperfections affected the functionality of the splints. Throughout the

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1/ A district court's decision to deny attorney's fees under the E.A.J.A. is reviewed for abuse of discretion. See Pierce v. Underwood, 487 U.S. 552, 562 (1988); Bay Area Peace Navy v. United States, 914 F.2d 1224, 1230 (9th Cir. 1990)

litigation, the government had a reasonable basis to believe that Dyna shipped splints with cracked parts. To determine whether the government's position was substantially justified a court must, under the totality of the circumstances, decide whether the position had a reasonable basis in both law and fact. Bullfrog Films, Inc. v. Wick, 959 F.2d 782, 784 (9th Cir. 1992). The court looks to the government's position as a whole rather than focusing on individual positions taken at different points of the litigation. See Commissioner, I.N.S. v. Jean, 496 U.S. 154, 159, 161-62 (1990). In this case, the government's central claim was that Dyna was liable to the government under the False Claims Act. This statute provides that anyone who knowingly presents a false or fraudulent claim to the government for payment shall be liable for a civil penalty of up to $10,000 plus treble damages. 2/ For purposes of the

2/ See 31 U.S.C. Section 3729(a).

Act, "'knowingly' requires at least 'deliberate ignorance' or 'reckless disregard.'" United States ex rel. Hagood v. Sonoma County Water Agency, 929 F.2d 1416, 1421 (9th Cir. 1991). The statute specifically provides that "no proof of specific intent to defraud is required." 31 U.S.C. Section 3729(b) (Supp. 1993).

Although the government asserts several possible theories on which its position may have been substantially justified, we find one dispositive. The government argues that Dyna shipped splints with cracked lock wheels and that these cracks constituted imperfections which the contract prohibited. The contract provided that:

> Metal parts shall be free from burrs, pits, corrosion, dirt, grease, foreign matter or other imperfections. Cloth and foam components shall be free from cuts, tears, ravels, dirt, grease, foreign material, or other defects.

The only reasonable interpretation of this contract provision is that metal parts must be free of imperfections in their construction or appearance, whether or not they have an effect on the serviceability of the splint. As the examples listed in the provisions make clear, metal parts containing cracks violate the contract. Such seemingly innocuous faults as dirt and grease count as "imperfections," as do irregularities such as burrs and pits, which are similar to cracks. Moreover, the contract's analogous provision prohibiting "defects" in cloth and foam components bars such imperfections as cuts and tears, as well as dirt and grease. The government clearly had at least a reasonable basis in law for its theory that knowing submission of splints with cracked lock wheels violated the False Claims Act.3/

3/ This is not to say that a government contractor violates the False Claims Act anytime it ships the government goods containing the slightest faults. A truly *de minimus* imperfection in a small number of goods (rather than the significant cracking in 21% of the

We conclude that the district court did not abuse its discretion in finding that this theory had a reasonable basis in fact. The government possessed a substantial amount of evidence that Dyna sold the government splints with lock wheels which contained cracks. The government interviewed several former Dyna employees who acknowledged that Dyna had changed from stainless steel to powered metal lock wheels. A number of these former employees stated that the powdered metal parts were subject to cracking, and that they repeatedly failed when tested. 4/ The government also conducted its own tests of the splints.

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lock wheels inspected here) would likely not implicate the Act. Moreover, only "knowing" or "reckless" submission violates the Act. A contractor that seeks payment for goods which violates the contract will not be subject to liability unless the government can show that the Act's scienter requirement is satisfied.

4/ Dyna criticizes the government for relying on the statements of former Dyna employees in deciding to prosecute the action. However, the former employees' statements were corroborated by the government's test as well as the documents recovered during the search.

An inspection of 66 unused Hare Traction splints which Dyna had delivered under its contract revealed that 12 of the splints had cracked lock wheels. In the investigator's opinion, these cracks constituted a major defect in the splints. He concluded that 21% of the samples examined were defective, far in excess of the "[n]ormal acceptable limits" of 1% for major and 2.5% for minor defects." Although the government did not conduct functional testing prior to filing the complaint, such testing would not have altered the conclusion that the cracks were impermissible imperfections. We believe that the government's investigations fully justified its decision to intervene and file the amended complaint in this action.5/

Dyna argues, however, that even if the

5/ Moreover, the contract prohibited defects which impaired the serviceability of the splints. If the government had a reasonable basis in fact to believe that the cracked lock wheels impaired the operation or safety of the splints, then it had a reasonable basis in law to conclude that the knowing submission of the splints violated the False Claims Act. While it not necessary to our decision, we conclude that the

government was substantially justified in its initial decision to proceed with the action, there was no substantial justification for maintaining the suit after two potential witnesses recanted the statements they had earlier made to government investigators. Although the recantations certainly weakened the government's case on the issue of scienter, 6/ the government still had a reasonable basis in fact for its claim. The government's inspection of the splints which Dyna had delivered to the government showed quite clearly that Dyna had shipped splints with cracked metal parts, and interviews with

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inspections and other investigations performed by government agents provided a reasonable basis in fact -- at least at the time the government filed its amended complaint -- for the government to conclude that the cracked lock wheels impaired the serviceability of the splint.

6/ These witnesses had told government investigators that high corporate officials had made the decision to ship the splints with the cracked metal parts. However, one later said in his deposition that he could not remember the company having allowed a cracked part to go out, and the other testified in a related trial in state court that she had never been instructed to ship any splints with defective parts.

former Dyna quality control inspectors, as well as company records (recovered during a search of Dyna's premises), indicated that Dyna's senior vice president approved a shipment of splints to the government after being informed that the wheels were cracking. 7/ Although recantations of the witnesses no doubt spurred the government to seek a settlement, they did not remove all reasonable basis from the government's claim. 8/

7/ Dyna argues that the government cannot rely on evidence obtained during the search and interviews with two of Dyna's former quality assurance personnel because these events occurred after the government decided to intervene. However, as the government rightly notes, Dyna suffered no prejudice from the decision to intervene. Pursuant to the stipulation, Dyna was not obligated to file any answer until the government filed its amended complaint. The parties entered into this stipulation to give the government more time to investigate.

8/ In addition, the government's post-complaint determination that the cracks might not have impaired the splints' serviceability did not remove the basis for the government's "imperfections" theory. Thus we need not consider whether to expand the record on appeal to permit consideration of the Freedom of Information Act material which shows that a government test on August

remanded to the district court for further proceedings. It seeks to depose and/or cross-examine the government's trial attorney, as well as the witnesses who submitted declarations on behalf of the government in its fee request. At a minimum, Dyna seeks a remand for the district court to consider Freedom of Information Act material the company has subsequently received. We reject Dyna's invitation to continue these proceedings any longer. None of the contentions Dyna proposes to assert on remand would undermine the conclusion that the government's position was substantially justified. Accordingly, we need not reach the government's argument that the statute prohibits all discovery in fee proceedings under the Equal Access To Justice Act.

AFFIRMED.

15, 1990 determined that the cracks did not affect the splints' serviceability.

APPENDIX B

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA ex rel. RONALD DAVIS,	)	Civil No. CV 88-1695-G
Plaintiff,	)	ORDER DENYING DEFENDANTS' APPLICATION FOR COSTS AND FEES UNDER THE EQUAL ACCESS TO JUSTICE ACT
v.	)	
DYNA CORPORATION, and GLENN F. HARE,	)	
Defendants.	)	

This matter is before the Court on the defendants' Application for Attorney's Fees and litigation Costs pursuant to the Equal Access to Justice Act, 28 U.S.C. Section 2412, filed December 17, 1991 (#114). The matter came on for hearing on February 18, 1992, with defendants Dyna Corporation and Glenn F. Hare represented by Charles L. Goldberg and Patrick Q. Hall and the United states represented by Michael C.

Theis and John J. Robinson. After considering the application and other materials filed in support by defendants, the government's papers in opposition to the application, the oral arguments of counsel, and the record as a whole, the Court entered oral findings and conclusions into the record which are incorporated herein by reference as if set out in full. For the reasons stated, the Court finds that the position of the United States was substantially justified. Accordingly therefore, it is

ORDERED that defendants' application for attorneys fees and litigation costs pursuant to 28 U.S.C. Section 2412 is denied.

DATED this ___ day of _____, 1992.

ORDER ENTERED MARCH 6, 1992

_____

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
WESTERN REGION

UNITED STATES OF AMERICA ex rel. RONALD DAVIS,	)	Civil No. CV 88-1695-K
Plaintiff,	)	San Diego, California
v.	)	Tuesday, February 18, 1992
DYNA CORPORATION, and GLENN F. HARE,	)	
Defendants.	)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JUDITH N. KEEP
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Proceedings recorded by electronic sound recording; transcript produced by transcription service.

[COMMENCING AT THE ORAL FINDINGS AND CONCLUSIONS]

THE COURT: All right. The first thing that I would like to mention is -- well, we've actually had probably our half hour anyway that Mr. Goldberg suggested, but submitted to me this morning the proposed cross-examination of Michael Tice [sic], and I would just point out that prior to today there's never been a request for a testimonial hearing on this, and certainly counsel were the ones that set the motion date, and indeed it was continued because Judge Gilliam recused himself on the attorney's fees issue and allowed additional time for counsel for Defendant to file a reply brief. But certainly, I mean, to come up today and say here's proposed cross-examination of Michael Tice [sic] is not the way to do it. There certainly could have been interrogatories or even a deposition that would be submitted for purposes of the hearing. The Court -- at this it was not set for any type of hearing, and this would not be the proper forum for it. So I certainly do

not feel that today was the time that I should be asking cross-examination of Mr. Tice. [sic] On October 27, 1988, Attorney Roy Landers on behalf of Davis, the relator, and the United States sued Dyna, Dyna-Med, and Hare, Dyna's President, for damages under 31 U.S.C. 3730, the False Claims Act. The complaint alleged defects in splints manufactured by Dyna and sold to the federal government. The complaint was immediately sealed for 60 days and the relator was ordered to serve the federal government a copy of the complaint with written disclosure of any supporting material evidence. The government did obtain three extensions of time to decide whether or not to intervene. On June 12, 1989, the government filed its notice of election to intervene and proceed with the action.

Around July 28, 1989, the Government filed an amended complaint for damages under the False Claims Act and common-law. It alleged that in response to a

Government contract Dyna supplied splints with defective parts in the heel stand assembly and stated that Dyna knowingly furnished splints that did not comply with the contract requirements and did not conform to Dyna's drawings, specifications, standards and quality assurance.

According to the complaint, the defects included stand-stops and lock wheels fabricated from powdered metal, infiltrated iron, instead of stainless steel, and, B, stand-stop pins that were not knurled but were instead glued in place. Defendant Hare allegedly directed the use of powered metal instead of stainless steel in order to reduce the machine time and cost to Dyna. The use of the powdered metal purportedly made the lockwheels and the stand-stops more brittle. In addition, the glued stand-stops allegedly made the splints unfit for use. On October 2, 1989, Defendants answered and denied the allegations of the complaint.

Negotiations failed to settle the case, which was

originally set for trial in January 1991. The Government subsequently moved to dismiss its complaint on October 7, 1991. The final judgment dismissing the case with prejudice was entered on November 20, 1991.

On December 17th of 1991, Defendants filed this motion for fees and costs under the Equal Access to Justice Act, 28 U.S.C. 2412. Plaintiff's filed their opposition January 21, 1992. On January 27, Judge Gilliam recused himself and continued the hearing to February 18. The Court also granted Defendants a continuance to file their reply, which was filed February 10th.

Both parties agree that the gravamen of the motion is whether the Government was reasonable in law and fact in prosecuting this case. Thus, the arguments before the Court today are largely factual.

I would like to note that the purpose of the Act and the purpose of providing for attorney's fees

essentially is that the Government has a deeper pocket than the litigants opposing or being opposed by the government -- and I have to say in this era of gross deficits whether that is true, but, nonetheless, that is the theory, that the government has a deeper pocket. And I think that both sides would agree that the concern by Congress was that the Government not abuse the power that it might have by having a deeper pocket in opposing a non-government entity before a court of law.

Defendants alleged that the government was unreasonable in suing Dyna and Hare. Defendants state that the Government had not performed metallurgical tests on the splints nor inquired as to why there were cracks in the powered-metal part when the government filed its complaint alleging that the pins were and the splints would fail due to use of powered metal. Metallurgical testing was subsequently performed in November through December of 1990.

Upon receiving the complaint, Dyna allegedly

indicated to the government that it would replace any splint which the government alleged was defective. Notwithstanding this offer, the Government proceeded with the lawsuit.

Finally, Defendants assert that the government did not accede to Dyna's request to have all the splints shipped to Dyna for testing. Counsel this morning indicated the reason for that was that it was essentially giving up all the evidence in the case.

Defendants also contend that the government did not ascertain the credibility of former employees who gave information adverse to Dyna's interests. In addition, the Government allegedly failed to interview current Dyna employees before filing suit.

Defendants assert that the Government ignored information, including at least two depositions that all the splints were tested. The deponents, former Dyna employees Fink and Gilley (phonetic), also stated that they were unaware of any splints which left the factory

with cracks.

Former defense counsel Grauer purportedly pointed out to Government counsel that government contract law establishes that where the Government chooses not to provide specs the contractor may select the appropriate material. To this end, Defendants alleged that a quality assurance supervisor of the Defense Personnel Center in Pennsylvania, Peg, allegedly contacted Government investigator Stokes. Peg purportedly stated that Dyna's contract did not call for stainless steel versus powered metal parts. Moreover, Defendants state that the change to powered-metal parts was a considered decision and a permanent change and was not the result of a rush change order to complete the Government contract.

The FDA was allegedly contacted during the pre-complaint investigation. The agency did not investigate until January of 1990. At that time, the FDA chose not to pursue any action against Defendants, concluding

that

> "We no longer believe that the device failure presents the health hazard that we initially believed that the device possessed. We will therefore not pursue action under section 518 of the Federal Food, Drug & Cosmetics Act."

Notwithstanding the FDA's findings, the Government still persisted in its suit until it agreed to the dismissal in the fall of 1991, when it was dismissed with prejudice in November of 1991.

The Government allegedly contacted Falkowski, who, according to the Defendants, was not an expert and was not trained to test Dyna's splints. Falkowski in his deposition on November 20, 1990 indicated that none of the cracks appeared to affect the splint's operation; however, in an earlier report Falkowski stated fracturing of the locking wheels is a major defect. Moreover, Falkowski's report purportedly recommended

warranty action although not a false claim or fraud suit.

According to Defendants, the Government initially alleged that substitution of materials violated provisions of the contract and that the use of the pins that were lock-tited was fraudulent. The Government purportedly did not set forth one shred of evidence to substantiate these allegations.

Based on the above, Defendants argue that the Government's suit was unreasonable and that they are entitled to attorneys fees.

The Government avers that it was reasonable factually and legally. First, factually, it asserts it conducted investigations before it filed the complaint. It states that before the relator served the U.S. with his complaint the relator discussed his allegations that Dyna changed the specifications for the splints with Government investigator Stokes. Moreover, in June 1988, FDA Agent Iacono allegedly was asked to assist in the investigation.

Iacono's declaration states that he reviewed quality control records at Dyna and interviewed former and current Dyna employees. He concluded the new powered metal-parts were cracking during the assembly and function testing at Dyna. He also concluded that Dyna's quality assurance personnel alerted their management to the cracking. Stoke's investigation purportedly corroborates Iacono's conclusions.

The Government asserts that Dyna's records reflect that after Dyna shipped the last quantity of splints to the Government Dyna returned the remaining unused powdered-metal parts to their vendor and manufacturer, Compax. The return form states: "The above items are breaking. Please redo."

In addition, before the Government filed its complaint, Falkowski, a Government quality assurance technician in the Defense Personnel Center in Pennsylvania, allegedly examined splints which Dyna shipped to the Government. Falkowski found 12 splints

containing visible cracks. Falkowski sent a memo to Stokes explaining that the fractures represented major defects occurring at an unacceptable rate.

The Government avers that after the U.S. intervened about 1,600 splints were examined by government employees with Dyna representatives present. Eleven percent of the splints purportedly exhibited cracks and fractures.

Now, I did in fact view the videotape during what was left of the lunch hour before the Judge's meeting at 1:00, and, as orally indicated to counsel this morning, I don't purport to be an expert on splints, and essentially that videotape outlined procedures that were being taken to check and stack into piles splints that exhibited any cracks and/or fractures, as a well as the powder versus the stainless steel.

The Government further contends that discovery revealed that Dyna had insufficient stainless steel parts to assemble all the splints required to fulfill the

Government contract. In addition, Dyna was in a rush to complete production of the splints because the contract imposed penalties for late shipments. As a result, Defendant Hare purportedly asked Dyna Engineer Fink to circumvent the delay in manufacturing stainless steel parts. The Government states that Fink then suggested using powdered-metal parts.

The Government alleges that Dyna assembly supervisor and two quality control employees observed that the powered-metal parts were fracturing and cracking. In addition, a machine shop supervisor and an engineer purportedly knew that the powered-metal substitutes were breaking during assembly of the splints.

The Government avers that Fink, Bill Hare, Dyna's Vice-President, and the relator observed that powdered-metal parts were breaking during quality control inspections.

As to metallurgical testing, the Government contends that the Defendants did not present any

evidence of testing conducted during the manufacture of the splints or after the lawsuit was unsealed to substantiate their view that serviceability of the splints was not affected by the cracks and fractures that had been discovered. Consequently, counsel for the Government believed it was appropriate to defer the metallurgical testing until after documents had been produced, written discovery had been exchanged, and the depositions of percipient witnesses had been taken. Having considered all of the material, I don't consider that an unreasonable approach.

At the heart of this case is the Government's contract with Defendant for splints. Splints were received with microscopic cracks in them, and that was obviously what caused the concern, first from the relator, and then with the investigation it was revealed that the quality assurance personnel at the Defendant had expressed their own concerns and reservations about the splints because of the cracking that was

noticed in the assembly and some that was noticed in those products that were being sent on.

Shipping goods known to be defective and requesting payment therefor is sufficient to establish liability under the False Claims Act. United States v. Borstein, 423 U.S. 303.

The Government argues the facts here presented a genuine issue whether Defendants violated the False Claims Act by knowingly submitting requests for payment when Dyna's own engineers and quality assurance employees believed that splints with powdered-metal parts were defective. The Government urges that the False Claims Act does not require a showing of specific intent to defraud.

> "A False Claim is actionable upon a showing that the defendant had actual knowledge that the claim was false, that he acted in deliberate ignorance of the truth or falsity of the claim, or that he

acted in reckless disregard of the truth or falsity."

31 U.S.C. 3729.

The Government asserts that the FDA's decision not to proceed with the action under section 518 of the Federal Food, Drug & Cosmetic Act does not demonstrate that a case cannot be made under the False Claims Act, arguing that although the risk of the defect was not as grave as initially believed, nevertheless the Government received splints with cracked and defective parts, and it relied upon the statements thereafter of Iacono, Bisonette, and Johnson.

Moreover, after discovery began to indicate that the substitution of materials in the splints did not have the effect on serviceability that the investigation initially indicated, the Government allegedly tried to resolve the litigation at repeated settlement conferences before Magistrate Judge Moskowitz.

28 U.S.C. section 2412, known as the "Equal

Access to Justice Act", does essentially provide as follows:

> "Except as otherwise specifically provided by this statute, a judgment for cost enumerated in section 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency in any court having jurisdiction of such action. A judgment for costs when taxed against the United States shall, in an amount established by this statute, court rule or order, be limited to reimbursing, in whole or in part, the prevailing party for the costs incurred by such party in the litigation."

Section D(1)(a).

> "Except as otherwise specifically provided

by statute, the court shall award to the prevailing party, other than the United States, fees and other expenses in addition to any costs awarded pursuant to subsection (a) incurred by that party in any civil action, other than costs sounding in tort, including proceedings for a judicial review of agency action brought by or against the United States in any court having jurisdiction of that action unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust."

Now, in this particular case, I think we are all arguing -- we are not arguing, I'm hopefully ruling wisely -- but the parties are arguing as to whether or not the United States was substantially justified in the position it took throughout the litigation.

The prevailing party is presumed to be entitled to an award of attorneys' fees under the Act. He or she is not required to prove that an amount of fees is warranted. Devine v. Sutermeister, 733 F.2d 892 at 896. The Government has the burden of proving that its position was substantially justified. Ramon Sepulveda v. I.N.S., 863 F.2d 1458, 1459.

The Ninth Circuit does not require the United States to show that it had substantial likelihood in prevailing. United States v. First National Bank of Circle, 732 F.2d 1444, 1447. Instead, the Government must show that its position was reasonably based in fact and in law. See Pierce v. Underwood, 478 U.S. 552. It was held that

> "A position can be justified even though it is not correct, and we believe that it can be substantially, i.e., for the most part justified if a reasonable person could think it correct; that is, if it has a

reasonable basis in law and in fact."

In determining whether the Government's position was substantially justified -- or, that is, reasonably justified in law and fact -- the court should examine both the Government's position during litigation and the Government's actions that led to the litigation. Abela v. Gustafson, 888 F.2d 1258, 1264.

The cases cited by the Supreme Court in Pierce articulate the questions that a district court must ask when deciding the reasonableness of the Government's position. Those are:

> (1) whether there was a reasonable basis in truth for the facts alleged in the pleadings;
>
> (2) did there exist a reasonable basis in law for the theory that the Government propounded; and
>
> (3) did the facts alleged reasonably support the legal theory the Government

advanced.

See United States v. Yoffe, 7775 F.2d 447,450; Citizens Council of Delaware County v. Brinegar, 741 F.2d 584, 593.

So, for the first issue then, is was there a reasonable basis in truth for the facts alleged in the pleadings; that is, has the Government so proven, keeping in mind that the Defendant has not a burden to prove anything.

Prior to filing, now I would point out that the facts in this case are heavily disputed -- hotly disputed on both sides. This is not a trial, but I don't find that the disputes necessarily -- well, they don't undercut a ruling on this motion, because essentially different people at time said different things in different stages of the proceedings, and essentially my initial inquiry has to be whether there was a reasonable basis in truth for the facts alleged in the pleadings.

Prior to the filing a\of the amended complaint by

the Government, the Government obtained affidavits of former and current Dyna employees. The Government -- excuse me -- the employees corroborated each other's observation that the powdered-metal parts were cracking and fracturing. The fact that the affidavits are sworn statement gives credibility to their content.

Now, it may that later in deposition counsel showed them not to be credible witnesses, but the point is that they had affidavits where employees corroborated each other's observations that the powdered-metal parts were cracking and fracturing.

The affidavits were also corroborated by the Dyna documents which Investigator Stokes and FDA Agent Iacono reviewed. Dyna's documents revealed that Dyna's management knew of the cracking and fracturing of the parts. Indeed, as noted earlier in this ruling, later they sent back parts when their contract with the Government was fulfilled saying, please redo parts are cracking.

In hindsight, maybe Government counsel should not have focused on the cracking and should have performed metallurgical tests to determine functionality of the splints before filing the complaint; however at the time, it seems reasonable for the Government to file the complaint, given the substantial evidence of cracks and fractures in the splints.

Common sense would say it's reasonable to believe that cracks affect functionality and safety of splints.

That's not a bizarre conclusion or an unusual conclusion or an extreme conclusion from given facts. Indeed, apparently Dyna's quality control persons were also concerned about that.

I also hold it was reasonable for the government to pursue discovery before retaining a metallurgy expert to test the splint if they indeed -- certainly Defendant may supply tests early on that would show that cracks have no bearing on the safety, and therefore there was

no need for expensive and extensive metallurgy tests. So I hold that there was -- given the state of the evidence that they had, it was reasonable for them to file the suit.

In addition, although Peg indicated that the contract did not call for stainless steel, the parts made from the powdered-metal substitute nevertheless did crack and fracture. As noted it was reasonable for the Government to conclude that fractures in the splint may constitute liability under the False Claims Act, especially because Dyna's quality control personnel recommended that Dyna stop shipping the splints.

Although Defendants proffered deposition testimonies that contradict the Government's evidence, the contradiction does not detract from the Government's position to prosecute. Lawsuits inherently involve conflicting information. That is the main reason why people are in court. The Government had substantial and credible and corroborating

information establishing cracks and fractures in the splints. Furthermore, the suit was dismissed once evidence suggested that the cracks did not affect functionality and that it was not worth pursuing the lawsuit any further.

There was a lot of discussion this morning by Mr. Goldberg saying that these microscopic splints (sic), you can't even see them unless you get up close, and the photographs -- or the photographs showing somebody right on top of it looking for the microscopic hairline. I don't find that in any way undermines the conclusion to file a lawsuit or proceed with a lawsuit.

The hairline fracture, whether it's -- a hairline as we all know, metal fatigue -- hairline fractures can grow larger. Determining that something may affect its functionality is often a costly process, but certainly the conclusion, based upon the evidence that they had when they went into the lawsuit -- it was not unreasonable, and also it wasn't, I would note again,

something that was an unusual occurrence because of those they tested about 11 percent were coming up cracked or fractured.

The second question is was there a reasonable basis in law -- well, before I get to that, the bottom line is, on issue one. is that the case was triable. And, again, keeping in mind the standard is that they did not have to prevail, but was the issue reasonably in law and fact -- or was it reasonably grounded in law and fact -- and I hold that it was.

The second issue is did there exist a reasonable basis in law for the theory propounded.

The Government was reasonable in pursuing a claim under the False Claims Act , which established liability against a person who

> (1) knowingly presents or causes to be presented to an officer or employee of the United States Government or a member of the armed forces of the United States a

false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the government.

Shipping goods known to be defective and requesting payment therefore is sufficient to establish liability under the Act. United States v. Bornstein, 423 U.S. 303.

Dyna represented to the Government that the splints sold to the Government conformed to the contract and to Dyna's quality control procedures. However, again, I note that Dyna's quality control personnel believed that the splints with the powdered-metal parts were defective and alerted management of their observations.

The fact that the Government chose not to

pursue a warranty action and have Dyna replace all of the alleged defective splints does not detract from the reasonableness of the prosecution under the False Claims Act. Even if Dyna had replaced the splints, if in fact the splints were defective, Dyna still would have been liable under the Act.

In addition, the FDA's decision not to pursue the action against Dyna under FDA regulations I hold does not affect the Government's decision to prosecute under the False Claims Act or to continue the prosecution. The FDA was concerned with the safety of the splint as a medical device, not with defects which may or may not be safe.

Three, did the alleged facts reasonably support the legal theory the Government advanced. The Government had documents and corroborating affidavits of Dyna employees that the splints with the substituted parts cracked while previously used stainless steel parts did not. The Government investigation revealed that the

powdered-metal parts broke during the quality control inspection at Dyna's facilities. Again, even Dyna's quality control specialists recommended that the company should refrain from shipping the splints with the powdered-metal parts to the Government.

Based on the foregoing, the facts and law alleged reasonably supported the Government's legal theory. Hence, I hold that the Defendant's motion for attorneys fees and litigation costs is denied.

Certainly in retrospect perhaps things should have been done differently at different times and in different ways, but the Court is not given that authority in this kind of case, and indeed it would be chilling on advocacy as well as chilling on settling cases if in fact every step that is taken is microscopically examined by a court who has the benefit of hindsight.

Rather, again, even though it is the Government's burden in this motion, the standard is, as articulated in this ruling, whether the Government's position is

reasonably based in fact and law -- and under the circumstances, I hold that it was.

I will direct that counsel for the Government draft a brief, bottom-line order, incorporate the oral ruling therein by reference, submit the bottom line order to Mr. Goldberg just for approval as to form, and then to me within two week's time.

APPENDIX C

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA ex rel. RONALD DAVIS,	)	Civil No. CV 88-1695-G
Plaintiff,	)	ORDER DENYING DEFENDANTS'
v.	)	MOTION FOR RECONSIDERATION,
DYNA CORPORATION, and GLENN F. HARE,	)	MOTION FOR COSTS UNDER 28 U.S.C. 2412 (a), AND MOTION FOR
Defendants.	)	ADDITIONAL DISCOVERY

This matter is before the Court on the Defendants' Motion For Reconsideration of Order Denying Defendants' Application for Attorney's Fees and Litigation Costs pursuant to the Equal Access to Justice Act, 28 U.S.C. Section 2412; and Motion For Leave To Take Deposition Of Justice Department Attorney Michael Theis and Other Witnesses and Other Further Discovery, filed March 18, 1992 (#135). These motions came on forr hearing on May 14, 1992, with

defendants Dyna Corporation and Glenn F. Hare represented by Patrick Q. Hall and Charles L. Goldberg and the United States represented by Michael C. Theis. After considering the motions and materials filed in support by defendants, the government's memorandum of points and authorities in opposition to the motions, the oral arguments of counsel, and the record as a whole, the Court entered oral findings and conclusions into the record which are incorporated herein by reference as if set out in full. For the reasons stated, the Court finds that the motions should be denied. Accordingly therefore, it is

ORDERED that defendants' Motion For Reconsideration of the Court's Order Denying Defendant's Application for Attorneys Fees and Litigation Costs be, and the same hereby is, denied; it is further

ORDERED that Defendant's Motion for Costs Pursuant to Title 28 U.S.C. Section 2412(a), be, and

the same hereby is, denied; it is further

ORDERED that Defendant's Motion to Conduct Additional Discovery be, and the same hereby is, denied.

DATED this ___ day of _____, 1992.

ORDER ENTERED JUNE 8, 1992

_____
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
WESTERN REGION

UNITED STATES OF AMERICA ex rel. RONALD DAVIS,	)	Civil No. CV 88-1695-K
Plaintiff,	)	San Diego, California
v.	)	Thursday, May 14, 1992
	)	8:25 a.m.
DYNA CORPORATION, and GLENN F. HARE,	)	
Defendants.	)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JUDITH N. KEEP
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For Plaintiff:

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For Defendants:

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Proceedings recorded by electronic sound recording; transcript produced by transcription service.

[COMMENCING AT THE ORAL FINDINGS AND CONCLUSIONS]

THE COURT: On February 18th of this year, I heard and denied Defendants' motion for attorneys fees and costs under the Equal Access to Justice Act, 28 U.S.C. Section 2412, et seq. I incorporate the hearing therein by reference. The order denying the motion was filed on March 6th.

March 18th Defendants filed their motion for reconsideration and the Government has opposed.

Essentially, I have to say that I also had a bit of difficulty trying to understand the basis for the motion since that wasn't spelled out in the papers. It's not appropriate under Rule 59(e) and, indeed, Mr. Hall has clarified orally this morning that they are bringing it under Rule 60 (b)(6), and any other reason justifying relief from the operation of the judgment.

I would like to note that the local rules for this district do provide as follows: Whenever any motion or

any application or petition for any order or other relief has been made and had been refused in whole or in part -- I'm deleting parts of this -- it shall be the -- and a subsequent motion or application or petition is made for the same relief in whole or in part upon the same or any alleged different state of facts, it shall be the continuing duty of each party and attorney seeking such relief to present to the judge to whom any subsequent application is made an affidavit of a party or witness or certified statement of an attorney setting forth the material facts and circumstances surrounding each prior application, including when or to what judge the application was made, what ruling or decision or order was made thereon, and what new or different facts and circumstances are claimed to exist which did not exist or were not shown upon such prior application.

Frankly, I had a little bit of difficulty with the motion to reconsider because there is a rather lengthy declaration submitted by the Defendant himself, Mr.

Hare, in support of this motion which does in fact exceed the page limits. But it's that -- it's very difficult to tell when one reads that what he is claiming is new. It is essentially a thorough reargument of the motion hearing that was held and does not truly specify or clarify what new or different facts and circumstances are claimed now to exist.

Essentially, what the motion boils down to is that in the Defendant's reply brief the last time around, there was kind of a fall back position in its argument. It was arguing at length for costs and attorneys fees to be awarded, more at length for attorneys fees than costs, but in the reply there was essentially a brief argument and that if you're not going to deny our relief, then give us discovery. And so presumably at this phase, they're focusing on the discovery ruling to say that id they had more discovery, they could in fact show that there are new facts and circumstances and that the Court was incorrect in the way it interpreted the facts at the prior

hearing. I kind of have gone to some length to explain what's before me because the reasoning is a bit circuitous. There is really not anything new in these papers. I quote on page two when they say that they need discovery -- they say, "For example, notwithstanding oral assertions that the investigation by FDA investigator Vincent Iacono in his contacts with witnesses established a reasonable and substantial justification for intervention in this action, Mr. Theis' own declaration reflects that the Defense Logistics Agency recommended intervention in this action based upon the results of the investigations conducted by the Defense Criminal Investigative Services and the results of the exams by the Quality Assurance Section of the Defense Personnel Support Center, Alan Falkowski. The decision to intervene apparently was not based upon any independent investigation by Vincent Iacono."

So, essentially, it is a reargument of material that was before the Court and asking for a reinterpretation

and a statement that this would indicate that if we did discovery, then we could suggest to the Court that the way the facts were developed at the prior hearing was incorrect and, therefore, we would be entitled to attorneys fees as well as to costs.

I don't see that there is anything new to justify the discovery. There is in the papers to some extent, and more in the declaration, an attempt to have the Court reevaluate again all the material submitted before and look at it differently. That's not properly a motion to reconsider. That's not new material or facts or circumstances that did not exist. It is essentially is now that we have had the one argument and had that long boring ruling, we're going to come back and argue it again and want to argue it again.

And I don't blame you for wanting to argue it again and I'm not going to say that it's -- I can understand why you want to. But, by the same token, there has to be some standard for when you can bring

a motion to reconsider or all were are going to do is have a number of dry runs on these dry rulings. And there just isn't enough time in the system to do that.

So I essentially first of all deny it because I don't see that there is anything new. And insofar as the discovery, I would point out that I have a very difficult time, based upon the law that was submitted by the Government Counsel, to say that in fact this should be allowed, for a number of reasons.

One of which -- and only one of which -- I mention at this hearing is that it seems clear that the legislative history was designed that this was not supposed to lead to another trial. And there was a concern in Congress about just what's happening here. There would be all these depositions and create two trials out of something that is supposed to be one case.

Then also, I have a problem -- and I deny the motion for discovery because it is really a fall back position the last time around. It's not as if the

Defendants brought a motion that they need to do discovery so they can bring their motion for costs. Rather, there was a lengthy, lengthy, lengthy briefing and hearing on that and it was always a fall back position. To in fact lose and then come back and say, "Now we need discovery because of the facts that are developed", would not only make -- run the risk of having the two hearings or the two trials that the Counsel for the Government talked about in its paper but actually making it three. We'll try it, we'll make a full kind of -- full hearing on the issue of attorneys' fees and costs and, if we lose that, then were going to come back and seek discovery.

Its supposed to be a supplement adjunct and simple aspect to the case to get the attorney's fees and cost decision before the Court. And, under the circumstances, I do find that the motion for discovery appropriately should be denied.

As to the issue of costs, I would concede that in

reading the record, this Court did not distinguish between the standards, and you are right. I have absolutely no quarrel with the Defense's statement -- and I didn't the last time but was just inarticulate on it -- that the issue as to costs, as contrasted to attorneys' fees, is whether the Court in its exercising of its sound discretion wishes to award the costs in this case to the Defendant. And it would be a matter of exercising the Court's discretion.

The problem is that I don't really have any basis this time, nor did I the last, to any -- any guidance in exercising that discretion. Essentially, all I'm told this time on the motion to reconsider is that:

> "In the instant case, as noted initially in the declarations of Glenn Hare, costs have previously been awarded against Messrs. Gille and Davis. None of these costs, however, have been paid. Accordingly, Dyna, in addition to

reconsideration of the motion based upon the request to conduct further discovery and the supplemental declaration of Glenn Hare, requests an award of costs under 2412(a)."

There rally are -- I still have not been given, wasn't the last time and haven't this, any cases that -- or standards that suggest how the Court should exercise discretion and when. It is clear that Judge Gilliam did award costs against Gille and Davis. The fact that they haven't paid I don't find sufficient ground to say, Well, therefore since they haven't paid, were going to turn to the Government and order you to pay in this case without more. So for that reason, I would deny the motion for costs, saying that I am denying it based upon exercising sound discretion. And you are correct. That was not clearly stated in the last ruling.

Insofar -- so I have ruled on your motion. I would say that I appreciate the frustration of Mr. Hare.

It's obvious in reading this declaration, even though it comes from you offices, that he is extraordinarily frustrated. I saw that at the last hearing. He has pride in his workmanship. His company has been affected. He feels he has paid a lot of money to defend something that was subsequently dismissed and he is very angry and frustrated. I can appreciate that and am sympathetic with the emotions that he feels. But I can't make these decisions based upon someone's frustrations or emotions. Unfortunately or fortunately, depending, there is law that governs the Court in exercising its judgments. And if I am sympathetic towards him, which I am to some extent, that does not allow me to award the motions that he's seeking.

So I will ask that you prepare just a brief, bottom-line order denying the motions for reconsideration. Submit it to Mr. Hall and Mr. Frant and then Mr. Goldberg maybe can quietly, quickly see it and submit it back to me.

APPENDIX D

EQUAL ACCESS TO JUSTICE ACT

28 U.S.C. SECTION 2412

(a) Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to a prevailing party in an civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. A judgment for costs when taxed against the United States shall, in an amount established by statute, court rule, or order, be limited to reimbursing in whole or in part the prevailing party for costs incurred by such party in the litigation.

(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review, including proceedings for review of agency action, by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified, or that special circumstances make the award unjust.

APPENDIX E

FALSE CLAIMS ACT

31 U.S.C. SECTION 3729

(a) LIABILITY FOR CERTAIN ACTS. - Any person who -

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government, or an member of the armed forces of the United states a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid; . . .

. . . is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus three times the amount of damages the Government sustains because of the act of that person . . .

(b) KNOWING AND KNOWINGLY DEFINED. - For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information -

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information;

(3) acts in reckless disregard of the truth or falsity of the information,

and no specific proof of intent to defraud is required.

(c) CLAIM DEFINED. - For purposes of this section, "claim" includes any request or demand whether under

a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

APPENDIX F

FALSE CLAIMS ACT

31 U.S.C. SECTION 3730

Civil actions for false claims

(a) Responsibilities of the Attorney General. The Attorney General shall diligently investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General shall bring a civil action under this section against the person.

(b) Actions by private persons. (1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of time during

which the complaint remains under seal under paragraph (2). Any such motion may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall -

(A) proceed with the action, in which case the action shall be conduced by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.